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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 289

EDYTHE YENOWINE,
ELSIE DENSMORE,
DONALD D. DENSMORE and
DANIEL W. ROWE, Administrator of the
Estate of LILA CRAWFORD, Deceased, - Petitioners,

versus

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WILLIAM L. GIBSON,
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IN THE

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EDYTHE YENOWINE,
ELSIE DENSMORE,
DONALD D. DENSMORE and
DANIEL W. ROWE, Administrator of the
Estate of LILA CRAWFORD, Deceased, - *Petitioners,*

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners, Edythe Yenowine, Elsie Densmore, Donald D. Densmore, and Daniel W. Rowe, Administrator of the Estate of Lila Crawford, deceased, pray that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit on April 2, 1965 (Petition for Rehearing denied April 30, 1965) which reversed the judgment of the District Court of the United States for the Western District of Kentucky.

OPINIONS BELOW.

No opinion was rendered by the trial court.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is found in 342 F. 2d 957.

A copy of the opinion of the Court of Appeals for the Sixth Circuit is appended hereto in the appendix.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The Judgment of the Court of Appeals sought to be reviewed (Appendix, page 25, *et seq.*), 342 F. 2d 957, was dated and entered April 2, 1965. Petition for Rehearing was filed April 21, 1965, and denied by an Order made and entered April 30, 1965. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED FOR REVIEW.

1. In a policy of automobile liability insurance can an automobile be said to be a replacement under the newly acquired automobile clause for the automobile named in the policy when this is contrary to the clear language of the policy, the intent of the insured, and the evidence of all parties to the action?

2. Can an insurance company deny coverage on a newly acquired automobile about which it was properly notified by the insured because the insured had owned an intervening automobile which was never intended by the insured as a replacement of the automobile named in the policy and about which interven-

ing car the insured never notified the company and where the intervening car was disposed of over six months before the accident in question took place?

3. In order for insurance to attach to a newly acquired automobile does the insured first have to transfer the old automobile in a completely legal manner to someone else when the rules say only that the old car must be "discarded" or "disposed of"?

4. Can a party to a jury trial who offers no objection or instruction prior to the jury's deliberation claim after the verdict against him that the instructions given to the jury by the trial court had a special meaning completely different from the normal one used by the jury?

STATUTES INVOLVED.

There are no statutes involved in the determination of this case.

STATEMENT OF THE CASE.

This is an action brought by the Petitioner, Edythe Yenowine, in Jefferson Circuit Court, Louisville, Kentucky, against the Respondent, State Farm Mutual Automobile Insurance Company, seeking to compel it to pay judgments totaling $18,260.39 which were previously obtained against her in said court on April 20, 1962, by the other Petitioners, Elsie Densmore, Donald D. Densmore, and Daniel W. Rowe, Administrator of the Estate of Lila Crawford, deceased, together with the cost of defending the State Court action including

her attorney's fee incurred therein in the sum of $1,000.00 and for her medical and hospital expenses incurred in the further sum of $1,369.00 all as provided for in a policy of insurance #332-085-F15-17 which she obtained from Respondent on April 7, 1956 (Record 26a) and which was still in full force and effect at the time of the automobile collision in question in June, 1961 (Record 2b, 16a).

The case was removed by Respondent to the U. S. District Court for the Western District of Kentucky at which time an intervening complaint was filed by the Petitioners, Elsie Densmore, Donald D. Densmore, and Daniel W. Rowe, Administrator of the Estate of Lila Crawford, deceased (Record 20a) seeking to have Respondent declared liable to pay the aforesaid judgments which they had obtained against Mrs. Yenowine.

The facts as established in evidence at the trial showed that Mrs. Yenowine had owned a 1953 Plymouth car which she covered by the insurance policy in question on April 7, 1956 (Record 26a). Thereafter, on August 11, 1960, she purchased a 1955 Plymouth automobile and did not trade the 1953 Plymouth in on the 1955 Plymouth because she had previously promised it to her son, Larry (Record 4b). Mrs. Yenowine drove the 1955 Plymouth for a few days and then discovered that it was burning oil (Record 41a) and decided that it was not a good car and that she did not wish to keep it (Record 28a). Mrs. Yenowine contacted the dealer who said that he would look for a better car for her (Record 3b). On November 30, 1960, the dealer took back the 1955 Plymouth and sold

Mrs. Yenowine a 1956 Plymouth automobile (Record 4b, 5b). It was this 1956 Plymouth which Mrs. Yenowine was driving on June 9, 1961, when the subject collision occurred (Record 11a) resulting in serious and permanent injuries to Elsie Densmore and Donald D. Densmore and causing the death of Lila Crawford.

Mrs. Yenowine did not call Respondent to report her purchase of the intervening 1955 Plymouth because she did not intend to keep it (Record 28a) and this was corroborated by Respondent (it claimed it never heard from her at all (Record 22b)). However, after acquiring the 1956 Plymouth and within the thirty day period required in her policy, sometime around December 15, 1960, she did telephone the local State Farm agency and reported the change of cars, to-wit: The 1956 Plymouth in place of the 1953 Plymouth (Record 36a, 25b, 26b).

From the time that Mrs. Yenowine acquired the intervening 1955 Plymouth on August 11, 1960, and when she obtained the 1956 Plymouth in November, 1960, which was involved in the collision, the 1953 Plymouth remained sitting in the drive at her home (Record 6b). She did not spend another dime on the 1953 Plymouth (Record 31b) and the car was never licensed for 1961 or any other year (Record 9b, 29b, 30b) and for several months priod to June 9, 1961, the date of the collision, the 1953 Plymouth was not driveable because the battery was down (Record 28b, 29b) and the 1953 Plymouth was still undriveable in 1962 when it was eventually transferred out of the

family and had to be towed in (Record 29b, 30b) at which time it still had the 1960 license attached (Record 30b). In fact the 1953 Plymouth was never driven after February, 1961 (Record 41a) and the only times the 1953 car was ever driven after Mrs. Yenowine acquired the 1956 Plymouth was once by her in January, 1961 (Record 42a) which was after the insurance had been removed from it in December, 1960, and a time or two by her son Larry who sneaked it out without her knowledge because he knew it had no insurance (Record 27b) and he had been told by her not to drive the car until he placed insurance on it (Record 6b).

Prior to the trial of this case the trial court had overruled State Farm's motion for summary judgment and in its Order (Record 24a) the court declared that there were two issues of fact to be determined, namely, as to whether (1) the 1956 Plymouth automobile replaced the 1953 Plymouth described in the policy issued by State Farm to Mrs. Yenowine and (2) whether Mrs. Yenowine notified State Farm within thirty days after her purchase of the 1956 Plymouth as a replacement of the car described in the policy.

At the trial the court submitted these issues to the jury in the form of four interrogatories (Record 67a) whose composition and wording were agreed to by all parties and which included two interrogatories setting out Respondent's two theories of the case: Either that the 1955 Plymouth replaced the 1953 Plymouth or that the 1956 Plymouth replaced the 1955 Plymouth. The trial court also gave the jury its instruction of what

constituted a replacement automobile (Record 66a) *which was likewise agreed to by all parties.*

The verdict of the jury as shown by its answers to the interrogatories (Record 67a) was that Mrs. Yenowine had called State Farm within thirty days after acquiring the 1956 Plymouth and reported the change of cars to the insurance company and that the 1956 Plymouth in fact replaced the 1953 Plymouth described in the policy.

State Farm filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial which was overruled by the trial court (Record 71a) which then entered judgment on the jury's verdict (Record 72a-74a).

Respondent appealed from the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit which reversed the action of the District Court. A Petition for Rehearing which raised substantially the same questions presented herein and which requested withdrawal of the opinion and substitution of a new opinion affirming the judgment of the District Court was overruled without comment.

REASONS FOR GRANTING THE WRIT.

The Judgment Rendered by the Court Below Should Be Reviewed by This Court to Correct an Injustice and Because It Decides an Important Question of Law Affecting in a Serious Manner the Rights of Holders and Third Party Beneficiaries of Automobile Liability Insurance Policies Not Only Contrary to How Such Question Has Been Decided by Another Federal Court of Appeals, But Also Contrary to the Kentucky Court of Appeals as Well, Which Should Be Settled by This Court.

The judgment of the court below that the intervening 1955 Plymouth replaced the 1953 Plymouth named in the policy of insurance and that the 1956 Plymouth which was involved in the accident replaced the 1955 Plymouth is contrary to the clear language of the insurance policy, the intent of the insured, the evidence of all the parties, and the law.

The court below in its consideration of the replacement of the 1953 Plymouth by either the 1955 Plymouth or the 1956 Plymouth dealt with only three of the four interrogatories answered by the jury as being "applicable" (Appendix, page 28) and omitted any consideration of the interrogatory wherein the jury decided that Mrs. Yenowine notified the Respondent in December, 1960, to change the insurance from the 1953 Plymouth to the 1956 Plymouth which was involved in the accident (Record 67a). The court below in making its decision that the issue of notice had no significance made a crucial mistake since it is demonstrable that this interrogatory and its answer

by the jury together with the lack of notice to the Respondent by Mrs. Yenowine as to the intervening 1955 Plymouth (both of which matters were not passed upon by the court below) are of absolutely vital importance to the correct decision of this case.

Mrs. Yenowine testified that she did not notify the Respondent about acquiring the intervening 1955 Plymouth since she did not intend to keep it (Record 28a) and this was corroborated by the Respondent (it claimed that it never heard from her at all (Record 22b)).

The court below in its opinion (Appendix, page 29) cited testimony of Mrs. Yenowine and the automobile salesman concerning their statements about "replacing" the 1955 Plymouth with the 1956 Plymouth. It is respectfully submitted that this layman's use of the word "replacement" has absolutely no significance whatsoever. The term "replacement" as used in this case has a very special meaning as defined by the courts in many decisions *(including the trial court in the case at bar)* and is also defined in the policy of insurance in question and it is these meanings only which are important.

Referring to the definition of what constitutes a newly acquired or "replacement" automobile under the policy (Record 75a) it is stated:

> "III. Automobile Defined.
>
> (a) AUTOMOBILE. Except where stated to the contrary, the word 'automobile' means:
>
> (1) DESCRIBED AUTOMOBILE—the motor vehicle or trailer described in the declarations:
>
> * * * * * * *

(4) NEWLY ACQUIRED AUTOMOBILE—an automobile, ownership of which is acquired by the named insured * * * if (a) it replaces an automobile owned * * * and covered by this policy, or the company insures all automobiles owned by the named insured * * * on the date of its delivery, *and (b) the named insured * * * notifies the company within thirty days following such delivery date* * * *." (Emphasis added.)

It is therefore apparent under this policy that before there can be a replacement automobile the insurance company must be notified by the insured and as stated, *supra*, it is undisputed that Mrs. Yenowine never notified the Respondent of the intervening 1955 Plymouth and hence that car could not possibly have replaced the 1953 Plymouth nor could the 1956 Plymouth have replaced the 1955 Plymouth in the policy since as demonstrated hereinabove the 1955 Plymouth never came into the picture at all in so far as the policy is concerned which, of course, is the whole point of this issue and of this case. During the oral argument of this matter in the Court of Appeals counsel for Petitioners pointed out this feature of the policy and *counsel for Respondent in his rebuttal made no reply to it.* If Mrs. Yenowine had had an accident with the intervening 1955 Plymouth during the more than three months she owned it the Respondent would undoubtedly have refused coverage by relying on the lack of notice.

The court's holding below that the issue of notice was "not applicable" is directly contrary to the holding of the Court of Appeals for the Fourth Circuit

which construed the same type of newly acquired automobile clause relating to the replacement of an automobile named in a policy which required ten days' notice and held in the case of *Mitcham* v. *Travelers Indemnity Co.*, 127 F. 2d 27 (1942), as follows at page 29 of the opinion:

> "There is another insuperable objection to the recovery under the policy in suit. The provisions of Article IV in regard to the automatic transfer of the insurance from one car to another expressly 'do not apply * * * unless the named insured notifies the company within ten days following the date of delivery of such other automobile.' The insured did not comply with this requirement. The new car was delivered on January 20, 1940, and the insured was killed while driving it on February 1, 1940. It was only after his death and after liability for damages had been incurred that the company was notified that the new car had been purchased and that a transfer of the insurance was claimed.
>
> "The requirement of notice was of obvious importance to the company. Amongst other purposes it served to inform the company of the identity and character of the vehicle to be covered by its policy and to enable the company to exercise the rights reserved to it in the policy and to ascertain whether the insured had complied with his obligations thereunder. It cannot be said that the policy provision was so immaterial to the risk that it could not be invoked for the purpose of avoiding the company contractual liability. * * *. The failure to give the notice was fatal to the claim

of the administratrix and the injured person that the car was covered by the policy when the accident took place."

In addition the holding of the court below on this issue is also contrary to the law of the State of Kentucky as set forth in the recent case of *Brown* v. *State Farm Mutual Automobile Insurance Co.*, Ky., 306 S. W. 2d 836 (1957).

This was a case involving a policy issued on June 13, 1955, covering a Studebaker. At that time the insured also owned a 1947 Ford car and a 2-ton Ford truck, neither of which was covered by the policy. The Studebaker became inoperable and the insured installed a new motor in the Ford car in July, 1955, thus putting it in driving condition and began using it. On or about August 25, 1955, the insured had an accident while driving the Ford car. Immediately after this accident he notified the Company thereof and requested it to defend him against any suits the injured persons might bring. On November 23rd, the Company wrote appellant a letter in which it denied all liability under Section IV of the policy requiring notice be given to it of a newly acquired automobile (Respondent in the case at bar took the same action with Mrs. Yenowine (Record 30a)). The policy provision regarding what constitutes a newly acquired automobile required notice within thirty days and is similar to the one at bar. The court in holding that there was no replacement of the Studebaker by the Ford car said at pages 837-838:

> "* * * This policy does not appear to us to be ambiguous, and it plainly refers to a 'newly acquired automobile' and requires the insured to notify the Company of the replacement within thirty days following the date of the delivery of the newly acquired car to him. In this instance appellant's Ford car was not 'newly acquired' but was owned by him long before he took out insurance on the Studebaker. Nor did he notify the Company that the Ford was replacing the Studebaker *within thirty days after the Ford was delivered to him,* since he owned the Ford car at the time he insured the Studebaker * * *. Manifestly, appellant could not replace the Studebaker with the Ford without notifying the Company * * *." (Emphasis by the Court.)

Our position on this issue is also supported by other authority. In the case of *Maryland Casualty Co.* v. *Toney,* 178 Va. 196, 16 S. E. 2d 340 (1941), where the court in ruling on a situation where the question was whether or not an automobile was a replacement under a newly acquired automobile clause where ten days' notice was required under the policy, said at page 343 of the opinion:

> "* * * The manifest purpose of the 'Automatic Insurance' provision is to have the coverage attach to the newly acquired car at the earliest time the insured needs protection, *provided he notifies the insurer within ten days of the commencement of such coverage.*" (Our emphasis.)

As further proof of the fact that the intervening 1955 Plymouth should have played no part in the

decision of the court below we cite this Court to the case of *Kaczmarck* v. *LaPerriere,* 337 Mich. 500, 60 N. W. 2d 327 (1953), which covered a situation similar to the one at bar. In the *Kaczmarck* case the policyholder traded the Packard named in the policy in on an intervening Oldsmobile *without notifying the insurance company of this Oldsmobile* and then disposed of the intervening Oldsmobile when he acquired a Pontiac automobile with which he had an accident. The defendant insurance company disclaimed responsibility because of the intervening car (as Respondent does here) but the court held that the insurance coverage applied on the Pontiac car, saying at page 329:

> "* * * The fact that during the intervening period he had owned an Oldsmobile, which he seldom operated and never sought to have covered under the policy, in no wise served to make the Pontiac, at the time of the accident, any less a replacement of the Packard. He notified defendant company of his acquisition of the Pontiac within 30 days from the date of its delivery to him, this making automatic insurance effective on it under clause VII."

Also in connection with this *Kaczmarck* case we point out the fact that the intervening Oldsmobile was owned by the policyholder for over seven months or almost twice the length of time Mrs. Yenowine had the intervening 1955 Plymouth and which she had disposed of on November 30, 1960, which was over six months prior to the accident of June 9, 1961.

The rule given to the jury by the District Court (Record 66a) as to what constituted a "replacement" automobile was:

> "A newly acquired automobile becomes a replacement as used in these instructions when it is acquired in fact as a replacement and the owner discards the old vehicle or retains the old vehicle not in working condition."

Neither this rule (nor the rule substituted by the Court of Appeals in its opinion herein (Appendix, page 28) says anything about the old car having to be given or sold in a completely legal manner to someone else in order that it be considered discarded (or disposed of). The court below has stated in the opinion (Appendix, page 32) that Mrs. Yenowine failed to make a legal gift of the 1953 Plymouth to her son and therefore she failed to dispose of the car. We submit that the plain language of the rule does not require a legal transfer to someone else—that it would have been simple enough for the rule to have said so in plain and unmistakable language if that was the meaning intended—*and, in fact, one would actually expect it to be so declared if such was the only meaning to be given to it* and that in the absence of such wording the rule and its language should be interpreted according to their usual and generally accepted meanings as shown by these definitions in Webster's New International Dictionary, Second Edition, to-wit:

To dispose of (page 752):

> "a. To determine the fate of; to fix the condition, employment, etc., of; to direct or assign for a use.

"b. To get rid of; to put out of the way; to finish with; as, to dispose of rubbish; to dispose of the morning's mail."

To discard (page 742):

"2. To cast off or dismiss as useless or as no longer of service; to put aside; reject, get rid of; drop; as, to discard old friends; discard a winter coat; discard a hypothesis.

"Syn. To discard, as here compared, is to put or throw aside or away, esp., as useless or outworn, something which one already has."

Applying the above definitions to the facts of the case at bar it is clearly evident that there is a heaping amount of evidence in the record to sustain the jury verdict that Mrs. Yenowine had discarded (or disposed of) the 1953 Plymouth:

1. She promised her son Larry that the 1953 Plymouth was his and that he could drive it whenever he had it insured (Record 4b).

2. After she acquired the 1956 Plymouth she did not spend another dime on the 1953 Plymouth (Record 31b).

3. The 1953 Plymouth was left standing in the driveway (Record 6b) where it remained until towed away months later in an undriveable condition (Record 29b, 30b).

4. The 1953 Plymouth was never licensed again and still had a 1960 license plate on it when it was towed away in an undriveable condition in 1962 (Record 29b, 30b).

5. Mrs. Yenowine never again drove this car (except for one time in January, 1961) (Record 42a, 29b) which was *after* the insurance had been removed from it.

6. As corroboration of the fact that the car was abandoned by Mrs. Yenowine is also the fact that it deteriorated through disuse in that the battery ran down (Record 29b).

7. Mrs. Yenowine, a widow, was employed as a hospital switchboard operator (Record 31b) and had absolutely no use for two cars and couldn't afford to maintain them both even if she wanted to—she was even financially unable to help her son Larry obtain insurance on the 1953 Plymouth (Record 30b) which is the reason it remained just standing in the drive.

8. Mrs. Yenowine's call to the insurance company in December, 1960, requesting removal of the insurance from the 1953 Plymouth and the placing of coverage on the 1956 Plymouth (Record 36a, 25b, 26b, 27b) in itself furnishes evidence that she was through with the old car.

9. When the 1953 Plymouth was traded off in 1962 as down payment on a car for her daughter, Mrs. Yenowine first requested and obtained her son Larry's permission before doing so (Record 31b). Since Larry was under age (Record 9b) and couldn't make a valid transfer of the car, Mrs. Yenowine made the bill of sale.

Since the jury decided the case in the Petitioners' favor in the trial court, Petitioners are entitled to have their evidence read in the light most advantageous to them and to be given the benefit of every inference of

fact fairly deducible therefrom and that where there is evidence tending to support the verdict that a motion for judgment N.O.V. should be refused. *American Jurisprudence, Judgments,* Volume 30A, Section 300, pages 354-355. In addition, the evidence favorable to the Petitioners' position together with the inferences that may reasonably be drawn therefrom are to be accepted as true. *Michelson* v. *House* (1950), 54 N. M. 197, 218 P. 2d 861; *McPhilomy* v. *Lister* (1941), 341 Pa. 250, 19 A. 2d 143, 142 A. L. R. 385. And to grant the motion the Court should be able to say that there is neither evidence nor inference from which the jury could have arrived at its verdict. *Chandler* v. *Battenfield* (1951), 55 N. M. 361, 233 P. 2d 1047; *Michelson* v. *House* (1950), 54 N. M. 197, 218 P. 2d 861.

The Respondent was content to have the trial court submit to the jury the definition of what constituted a replacement automobile without objection by said Respondent and without any request by it that the trial court should further define the word "discard" contained therein as meaning "a legal transfer to another person." Since the jury was not given any special definition by the trial court of "discard" the jurors apparently applied the normal meaning of the word *(What else could they have done?)* in arriving at their finding that Mrs. Yenowine had (to paraphrase what the dictionary says, *supra*): "put or threw aside or away (the 1953 Plymouth) which (she) already had."

It is clear that the 1955 Plymouth car never replaced the 1953 Plymouth because Mrs. Yenowine did not notify the insurance company about it, thus leav-

ing the only remaining possibility, namely, that the 1956 Plymouth replaced the 1953 Plymouth *as the jury so found.* Mrs. Yenowine had insurance coverage only on the 1953 Plymouth until December, 1960, when she notified the insurance company to transfer the coverage to the newly acquired 1956 Plymouth *(as the jury again found and which finding the Respondent has never challenged).* The only possibility for coverage on the intervening 1955 Plymouth (and it was only a possibility) arose during the 30-day period between August 11, 1960, when she acquired it, to September 10, 1960, when the time expired under the policy for notifying the company, and there is authority in the case of *Merchants Mutual Casualty Company* v. *Lambert,* 90 N. H. 407, 11 A. 2d 361, 362, 363 (1940), showing that since the insurance company did not have a clause in the policy covering this situation that it was properly disregarded by the trial court as being "indecisive."

As stated above, the insurance on the 1953 Plymouth ceased when Mrs. Yenowine called the company in December, 1960, and thereafter this car ceased to constitute any risk to the Respondent and so whether she drove this car afterward only once (as she did) or a thousand times is of no consequence at all since it was then uninsured and the insurance company would have denied liability because of the said notice and the removal of coverage from this car.

We respectfully submit that it was the mistake of the Court of Appeals in not thinking the issue of notice was "applicable" (Appendix, page 28) and its failure

in said opinion to relate this vital issue of notice to the facts of this case—both the lack of same by Mrs. Yenowine as to the 1955 Plymouth and the *unchallenged* finding of the jury that she did give notice on the newly acquired 1956 Plymouth and the consequent removal of coverage to the 1953 Plymouth—that the court below came to feel as it stated in the opinion (Appendix, page 32) that "Mrs. Yenowine (was) receiving insurance coverage for two automobiles at the same time for a premium insuring only one car." When the notice factor, which was entirely omitted and untouched upon by the Court of Appeals, is related to the case all thoughts of "dual coverage" are shown to be completely groundless.

We call the Court's attention to the fact that there is a body of law in several states having compulsory Financial Responsibility laws (as Kentucky does) holding that an insurer cannot interpose the defense of an alleged breach of the policy by the insured against innocent injured third parties, 29 A. L. R. 2d 817 (although apparently Kentucky does allow such defenses). Our point here is that from a moral consideration since the Respondent has been allowed to use such defenses against the intervening Petitioners that they should be given the aid of *all* the applicable law including any exceptions to the general rule under which this case was tried. Therefore, the intervening Petitioners are entitled to claim an *added* right to rely upon the cases allowing coverage where there is "temporary retention" such as the one of *Brescoll* v. *Nationwide Mut. Ins. Co.*, 116 Ohio App. 537, 22 Ohio

Ops. 2d 423, 189 N. E. 2d 173 (1961), *where the court in that case allowed coverage even where the old car was retained by the policyholder at the time of the accident and was in a driveable condition for six weeks prior to said accident where the new car was actually purchased to replace the car named in the policy for the same use.* (In the Yenowine case at bar the 1953 Plymouth described in the policy was undriveable for several months prior to the accident of June 9, 1961, and remained so afterwards (Record 9b, 29b, 30b.))

It is manifest that only by changing the trial court's definition in its instructions to the jury of what constituted a replacement to read:

> "A newly acquired automobile becomes a replacement as used in these instructions when it is acquired in fact as a replacement and the owner *(legally transfers ownership of the old vehicle to another person)* or retains the old vehicle not in working condition,"

can there be a basis for saying that Mrs. Yenowine failed to discard (or dispose of) the 1953 Plymouth. Since the Respondent accepted the definition of "replacement" as given in the instructions to the jury by the trial court without objection by the Respondent and without requesting that the term "discard" contained therein should be defined, *and apparently couldn't have made such a request even if it had wished since Respondent at no time has ever cited any authority upholding such a construction of the words "discard" (or "disposed of") as shown above in our*

revised definition of "replacement," it is therefore apparent that the jury and the trial court correctly decided the issue.

Also, having agreed to let the jurors decide the issue of whether or not Mrs. Yenowine discarded the 1953 Plymouth according to the jurors' understanding of the term "discard" in its normal meaning, the Respondent is, in addition, now estopped to suggest a different meaning to the word than the usually accepted one applied by the jury. Rule 51 of the Federal Rules of Civil Procedure provides:

> "Instructions to Jury; Objection.
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis added.)

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15947

EDYTHE YENOWINE,
Plaintiff-Appellee,
and
ELSIE DENSMORE, DONALD D. DENSMORE, and DANIEL W. ROWE, Administrator of the Estate of LILA CRAWFORD, Deceased
Intervenors-Appellees,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellant.

APPEAL from the United States District Court for the Western District of Kentucky.

OPINION—Decided and Filed April 2, 1965.

Before: WEICK, Chief Judge, and MILLER and PHILLIPS, Circuit Judges.

MILLER, Circuit Judge. The appellant, State Farm Mutual Automobile Insurance Company, issued its automobile liability insurance policy No. 332085—F-15-17 to the plaintiff, Edythe Yenowine, covering a 1953 Plymouth automobile owned by her, effective April 7, 1956. On August 11, 1960, while the policy was in force and effect by reason of annual renewals, she purchased and acquired title to a 1955 Plymouth automobile without any trade-in being involved, which she drove regularly until November

30, 1960. Shortly after purchasing and driving the 1955 Plymouth she discovered that it "burned oil" and was not a good car, and notified the seller to that effect. He examined the car, was of the opinion that the motor was bad, and told her that as soon as he could get a car that he thought would suit her, he would replace the car. In November 1960 he got a 1956 Plymouth which he considered suitable, and called Mrs. Yenowine. In November 30, 1960, she returned the 1955 Plymouth to him and he transferred the 1956 Plymouth to her in exchange.

On June 9, 1961, Mrs. Yenowine, while driving the 1956 Plymouth, was involved in an automobile accident in Louisville, Kentucky, which resulted in personal injuries to two of the occupants of the other car, and in death to a third occupant of the other car. The injured occupants of the other car and the Administrator of the deceased party instituted action in the state court against Mrs. Yenowine, who called upon the appellant insurance company to defend the action under its policy No. 332085—F-15-17 issued to her and covering the 1953 Plymouth. It was her contention that the coverage under that policy included the 1956 Plymouth under a provision therein which included in its coverage a newly acquired automobile wl ich replaced the automobile covered by the policy, which will be discussed more in detail hereinafter. The insurance company was of the opinion that the policy did not cover the 1956 Plymouth and declined to defend the action. Mrs. Yenowine employed her own attorney to do so, whose fee was $1,000.00. The trial resulted in judgments against Mrs. Yenowine, totaling $18,260.39. The insurance company refused to pay both the judgments and the attorney's fee.

Mrs. Yenowine filed this action the state court against the insurance company for the amount of the judgments, the attorney's fee, and for various additional amounts on

account of personal injuries and medical expenses suffered by herself and her two children, who were in the car with her, and for property damage to her automobile, which she claimed were also covered by the policy. The action was removed to the United States District Court, where the injured occupants of the other car and the Administrator of the deceased party filed an Intervening Complaint seeking enforcement of their judgments against the insurance company in accordance with the terms of the policy. The insurance company denied coverage of the 1956 Plymouth under its policy No. 332085—F-15-17, which was originally issued to cover the 1953 Plymouth.

The provision in policy No. 332085—F-15-17, under which Mrs. Yenowine claimed coverage, reads as follows:

> "III. Automobile Defined.
>
> (a) *AUTOMOBILE.* Except where stated to the contrary, the word 'automobile' means:
>
> (1) *DESCRIBED AUTOMOBILE*—the motor vehicle or trailer described in the declarations;
>
> * * * * * * * *
>
> (2) *NEWLY ACQUIRED AUTOMOBILE.*—an automobile, ownership of which is acquired by the named insured, ... if (a) it replaces an automobile owned . . . and covered by this policy, or the company insures all automobiles owned by the named insured . . . . on the date of its delivery, and (b) the named insured . . . notifies the company within thirty days following such delivery date. . . ."

The courts which have interpreted this clause in insurance policies are generally in accord, as are we, with the following ruling as to what constitutes a replacement vehicle.

". . . the replacement vehicle is one the ownership of which has been acquired after the issuance of the policy and during the policy period, and it must replace the car described in the policy, which must be disposed of or be incapable of further service at the time of the replacement."

State Farm Mutual Automobile Insurance Co. v. *Shaffer*, 250 N. C. 45, 108 S. E. 2d 49; *Mitcham* v. *Travelers Indemnity Co.*, 127 F. 2d 27, C. A. 4th; *Lynam* v. *Employers Liability Assurance Corp.*, 218 F. Supp. 383, D. C. Del. The parties herein apparently accepted this construction, the substance of which the District Judge gave in his instructions to the jury.

Upon the conclusion of the evidence, the District Judge overruled defendant's motion for a directed verdict and submitted the case to the jury on four interrogatories, the following three of which are applicable to the question now under consideration. In answer to whether the 1955 Plymouth purchased on August 11, 1960, replaced the 1953 Plymouth, the jury said "no." In answer to whether the 1956 Plymouth purchased on November 30, 1960, replaced the 1953 Plymouth, the jury said "yes." In answer to whether the 1956 Plymouth replaced the 1955 Plymouth as "replacement" was defined in the instructions, the jury said "no." After overruling defendant's motion for judgment notwithstanding the verdict, or in the alternate for a new trial, judgment was entered in favor of the plaintiff and intervening plaintiffs, from which this appeal was taken by the insurance company.

The question argued by Mrs. Yenowine in the District Court and in this Court is whether the 1953 Plymouth was replaced by the 1956 Plymouth within the provisions of the policy originally issued to cover the 1953 Plymouth. We are of the opinion that this is not the correct analysis

of the question involved. The undisputed facts clearly show that the 1956 Plymouth replaced the 1955 Plymouth, which was purchased by Mrs. Yenowine and later replaced by the seller with the 1956 Plymouth when complaint was made by Mrs. Yenowine that the car which he sold to her was defective. With respect to her ownership and use of the 1955 Plymouth, Mrs. Yenowine testified that she complained to the seller about the car and "I kept it until I got a replacement." The seller testified that Mrs. Yenowine complained about the 1955 Plymouth and brought the car to his lot for him to look at, and that after listening to the motor he told her that "the motor was bad and as soon as I could I would replace that car." He also testified about what he did about "replacing that automobile," and in answer to the direct question, "Did you replace that automobile with some other car?" he answered "I did." by taking back the 1955 Plymouth and transferring to Mrs. Yenowine the 1956 Plymouth. There is no contradiction in any way in the evidence about the fact that Mrs. Yenowine acquired the 1956 Plymouth as a replacement for the 1955 Plymouth, not the 1953 Plymouth. The answer of the jury to the interrogatory that the 1956 Plymouth did not replace the 1955 Plymouth is directly contrary to the undisputed evidence and can ot stand. Under this analysis of the question, the 1956 Plymouth replaced the 1955 Plymouth, not the 1953 Plymouth, and there was no insurance coverage carried over from the coverage of the 1953 Plymouth.

We think that the real question presented by this case is whether the 1955 Plymouth replaced the 1953 Plymouth, in which event the extended coverage would be applicable to the 1955 Plymouth. This factual issue was decided against the plaintiff by the jury, which answered one of the interrogatories by finding that the 1955 Plymouth did not replace the 1953 Plymouth. But even if it should be so held,

this would not help the plaintiff's case, in that the 1955 Plymouth was not the car involved in the accident.

The best that we can make out of plaintiff's case is the contention that the 1955 Plymouth replaced the 1953 Plymouth, contrary to the jury's verdict, and that thereafter the 1956 Plymouth replaced the 1955 Plymouth and automatically acquired the insurance coverage which the 1955 Plymouth had acquired. This would require us to hold that the policy covered not only a car that replaced the car that was originally insured, but also a third car that replaced the second car that replaced the first car. This, we are not willing to do at the present time, but, assuming, without deciding, for the purpose of argument that such a construction is a permissible one, we will consider whether either the 1955 Plymouth or the 1956 Plymouth replaced the 1953 Plymouth within the meaning of the policy provision relating to a newly acquired automobile.

The evidence appears to us to be undisputed that at the time of the purchase of the 1955 Plymouth and of the acquiring of the 1956 Plymouth on November 30, 1960, the 1953 Plymouth was not "incapable of further service." It remained thereafter in the driveway of Mrs. Yenowine's home. Mrs. Yenowine admitted in her testimony that it was "in running order" on November 30, 1960, and up until March 1, 1961, when the license expired; that her son drove it in both January and February 1961; and that she also drove it one time after November 30, 1960, and encountered no difficulty in doing so. Her son testified that he drove the 1953 Plymouth "around to the store and ball games" in December 1960. We find no evidence directed to any specific trouble in the car, except the fact that the battery ran down, which in no way transformed it into a car "incapable of further service." It will also be noted that Mrs. Yenowine testified that she did not trade in the 1953 Plymouth on the 1955 Plymouth because she

planned to give it to her son, and that when she told her son after she got the 1956 Plymouth that he could have it "it ran all right." Certainly, Mrs. Yenowine did not plan to give her son a car that was "incapable of further service." The contention that the 1953 Plymouth was "incapable of further service" is completely contradicted by the undisputed evidence.

With respect to the other necessary requirement that the automobile originally insured "must be disposed of" at the time when the replacement vehicle is acquired, Mrs. Yenowine contends that the 1953 Plymouth was given to her son, and so disposed of in that way. But an analysis of her testimony fails to show just when the alleged gift was made or that the physical possession of the car or of the keys thereto was ever transferred to the son. On the contrary, Mrs. Yenowine testified, "I had promised it to my son, Larry, going to give it to him." and "He knew that the car was going to be his when he got the insurance for it." and "I don't know exactly when it was, but he understood when I got a new—another car, he was to get the '53. When I got the 1956 car and it was satisfactory, then Larry knew he was going to get the '53." and "He knew he was going to get it when I bought another car. For a long, long time, he knew it." She also admitted that it was just an oral promise that she was going to give it to him and that she did not draw up a bill of sale. She further testified that the 1953 Plymouth continued in her name until May or June 1962, as which time it was traded in on a car that was purchased by her daughter.

There was also the testimony of the son that he and his mother talked it over about her giving him the car when she got another one, but that she never did actually give it to him and that he "never did actually get the car." This conclusion is supported by Mrs. Yenowine's own testimony

with respect to the use by the son of the 1953 Plymouth in January 1961 when she said "It was driven a time or two. Larry sneaked it out.", which indicates that she considered herself as still being the owner of the car after she acquired and was operating the 1956 Plymouth.

Under these facts, we think that as a matter of law there was no gift of the 1953 Plymouth from Mrs. Yenowine to her son prior to or at the time of her acquisition of the 1956 Plymouth. *Government Employees Insurance Co.* v. *Thomas* (Ky. Court of Appeals), 357 S. W. 2d 548; *Rodriguez* v. *Rodriguez,* 310 F. 2d 62, 64-65, C. A. 8th; *Tyson* v. *Commissioner,* 146 F. 2d 50, 54, C. A. 8th; *Murray* v. *Gadsden,* 197 F. 2d 194, 205, C.A.D.C. A promise or intention to make a gift in the future does not constitute a transfer of title so as to make the promisee the owner of the property. *Allen* v. *Withrow,* 110 U. S. 119, 128; *Union Trust Co.* v. *United States,* 54 F. 2d 152, 155, C. Cls., cert. denied, 286 U. S. 547; *True* v. *United States,* 51 F. Supp. 720, 725, E. D. Wash.; *In re: F. W. Newport Corp.,* 194 F. Supp. 757, 761, S. D. Cal.

Since the 1953 Plymouth was owned and operated by Mrs. Yenowine after the purchase of the 1955 Plymouth and the acquisition of the 1956 Plymouth, the judgment of the District Court would result in Mrs. Yenowine's receiving insurance coverage for two automobiles at the same time for a premium insuring only one car. This, of course, was not the purpose of the policy provision under which she claims in this case.

We are of the opinion that appellant's motion for judgment notwithstanding the verdict should have been sustained. The judgment is reversed and the case remanded to the District Court for the entry of a judgment in favor of the defendant.

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IN THE

Supreme Court Of The United States

October Term, 1965

No. 289

EDYTHE YENOWINE,
ELSIE DENSMORE,
DONALD D. DENSMORE, and
DANIEL W. ROWE, Administrator of the
Estate of LILA CRAWFORD, Deceased, - Petitioners,

versus

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, - - - Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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DANIEL W. ROWE, Administrator of the
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versus

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY - - - *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Under the terms of the policy sued on did the 1956 Plymouth automobile, which Petitioner Edythe Yenowine was driving on June 9, 1961, when she was involved in an accident, qualify as a "replacement" for the 1953 Plymouth which was "covered by the policy" so as to afford liability coverage to Yenowine for judgments obtained against her, as a result of the accident, by the other three petitioners?

Petitioners' Statement of the Questions Presented for Review (Petition pp. 2-3) does not present "questions" but arguments in support of their contentions and Respondent submits the question presented above fairly summarizes and delineates the issue now before this Court and is the real and decisive question which was presented, by Petitioners and Respondent, to the Court of Appeals and, in fact, is the same and only question presented by the pleadings in the District Court.

In the complaint filed, by Petitioner Yenowine, in the District Court (9a-10a) it is alleged, in part, that Yenowine "purchased said 1956 model Plymouth automobile and that said 1956 Plymouth automobile was to replace the 1953 Plymouth automobile owned by plaintiff and covered by said insurance policy." It was further alleged that said information, within 30 days from the date of acquisition of the 1956 Plymouth, was given to a "woman" in the office of one of Respondent's agents.

Respondent's Statement of Questions as presented in its original brief to the Court of Appeals was:

> "Did the 1956 Plymouth, which Plaintiff-Appellee Yenowine was driving on June 9, 1961 when she was involved in an accident, 'replace' the 1953 Plymouth 'covered by the policy' so as to afford coverage to Plaintiff-Appellee Yenowine for Judgments obtained against her by the Intervenors-Appellees?"

The only other question presented by Respondent in its original brief related to coverage C of the policy

sued on which provided for the payment of certain medical expenses subject, however, to an exclusion where the injured persons are in an automobile owned by the named insured and not covered in the insuring agreement, it being Respondent's contention that the 1956 Plymouth automobile was so owned by Yenowine who was the named insured.

The Petitioners' Counter-Statement of the Question involved as presented in their brief before the Court of Appeals was:

> "Did the 1956 Plymouth which Plaintiff-Appellee Yenowine was driving on June 9, 1961, when she was involved in an accident, in fact replace the 1953 Plymouth described in the policy so as to afford coverage to Plaintiff-Appellee Yenowine for Judgments obtained against her by the Intervenors-Appellees as well as coverage for medical expenses and the expense of defendant (sic) the State Court action incurred by her?"

Respondent, therefore, respectfully submits that its Statement of the Question presented to this Court fairly presents the present issue and that all other possible arguments or suggestions of questions are subsidiary to and only possible facets of, the real and controlling issue, namely, Whether the 1956 Plymouth, under the terms of the policy, in fact and in law, qualified as a "replacement" for the 1953 Plymouth which was "covered by the policy" sued on.

COUNTER-STATEMENT OF THE CASE

Petitioners do not contend that the Opinion of the Court of Appeals fails to correctly set forth the facts of the case and since Respondent believes that the Opinion states the pertinent facts, necessary to deciding the issue now before the Court on the Petition, Respondent will not again review the facts, the pertinent portions of which are in the Record now before the Court as found in the Appendices to the briefs of the parties filed with the Court of Appeals, and this Counter-Statement, therefore, will be devoted to correcting several inaccuracies in Petitioners' statement of the case as well as to demonstrate that certain portions of the factual statement are not relevant to any issue here involved.

On Page 15 of the Petition, it is stated that the District Court, in its instructions to the jury, defined "replacement" as follows:

> "A newly acquired automobile becomes a replacement as used in these instructions when it is acquired in fact as a replacement and the owner discards the old vehicle or retains the old vehicle not in working condition."

Respondent agrees that the Court's definition above is correct but Respondent did not agree that said instruction should be given to the jury nor agree that the case should be submitted to the jury on any theory but, on the contrary, made motions for a directed verdict at the conclusion of the plaintiff's and inter-

venors' proof and again at the conclusion of all of the proof.

Respondent again urged the Court in its Motion for Judgment Notwithstanding the Verdict (68a-71a) that the case should not have been submitted to the jury on any theory because, as a matter of law and fact, Petitioner Yenowine's 1956 Plymouth did not "replace" the 1953 Plymouth.

Petitioners, in their statement of the case on Pages 16 and 17 of the Petition, set forth nine factual circumstances which Petitioners claim constitute "a heaping amount of evidence in the Record to show that Petitioner Yenowine 'had discarded (or disposed of) the 1953 Plymouth.' "

Respondent calls the Court's attention to the fact that none of the factual circumstances alleged are in any way at variance with or militate against the Opinion of the Court of Appeals which states, in substance, (1) that the evidence is "undisputed" that at the time of the purchase of the 1955 Plymouth, which plaintiff purchased in August 1960, and again when the 1956 Plymouth was acquired on November 30, 1960, that the 1953 Plymouth which was covered by the policy, WAS NOT "incapable of further service," and (2) the 1953 Plymouth, at the pertinent times, was owned by Petitioner Yenowine and had not been disposed of by her.

The issue before the Court is controlled not by the condition of the 1953 Plymouth in June of 1961, when the accident occurred, but its condition at the

times both the 1955 and 1956 Plymouths were acquired. On each of these occasions Peititoner Yenowine admitted that the 1953 Plymouth was not only "in running order," (41a) but had actually been driven "some" until March of 1961 which was even after the 1956 Plymouth had been acquired (41a-42a).

REASONS WHY CERTIORARI SHOULD BE DENIED

1. COVERAGE WAS NOT AFFORDED TO PETITIONERS, UNDER THE "NEWLY ACQUIRED AUTOMOBILE" CLAUSE OF THE POLICY SUED ON, BECAUSE THE 1956 PLYMOUTH, INVOLVED IN THE ACCIDENT, DID NOT EITHER IN LAW OR IN FACT, "REPLACE" THE 1953 PLYMOUTH WHICH WAS "COVERED BY THE POLICY" AND WHICH WAS RETAINED BY THE POLICY-HOLDER, PETITIONER YENOWINE, "IN WORKING CONDITION."

This case involves the following provisions of the "Newly Acquired Automobile" clause of the policy, issued by Respondent to Petitioner Yenowine, which insured a 1953 Plymouth automobile:

> "(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the named insured, * * * if (a) it replaces an automobiled owned * * * and covered by this policy, or the company insures all automobiles owned by the named insured * * * on the date of its delivery, and (b) the named insured * * * notifies the company within thirty days following such delivery date * * *" (9a).

The Petitioners must first prove that the 1956 Plymouth automobile which was involved in the accident on June 9, 1961, qualified, under the above policy provision, as a "Newly Acquired Automobile."

There is no claim that Respondent insured all automobiles owned by the named insured, Edythe Yenowine, on the date that the 1956 Plymouth was delivered for the obvious reason that on the date of delivery of the 1956 Plymouth, the Petitioner Yenowine owned the 1953 Plymouth automobile which was "covered by this policy" and also owned a 1955 Plymouth which was insured for collision loss by another insurer, the Ohio Casualty Insurance Company (39a-40a).

Petitioners, therefore, must rely on their claim that the 1956 Plymouth replaced the 1953 Plymouth "covered by the policy."

One of the leading cases, which considers the replacement provision of the Newly Acquired Automobile clause, is *Micham* v. *Travelers Indemnity Co.*, 127 F. 2d 27 (1942), C.C.A. 4th Circuit, wherein Travelers' named insured, Gray, purchased and acquired title to a new Lincoln but did not trade in the Buick, which was covered by the policy, although he left the Buick with a motor company, from which he had purchased the Lincoln. Gray hoped that the Buick could be sold for $500.00, so that he could buy an automobile for his mother whose Ford car he used as a partial down payment for the Lincoln. He did not transfer title to the Buick which was covered under the Travelers policy. The Court held that the Lincoln

did not qualify under the Newly Acquired Automobile provision of Travelers' policy, and, therefore, no coverage was afforded to Gray for an accident which occurred while he was driving the Lincoln, and in so doing, stated: (p. 29 of the opinion).

> "The purpose of the insurer to cover only one car is correctly set out in this argument, but the factual situation does not support the appellant's contention. The evidence supports the finding of the District Judge that the Lincoln Zephyr did not in fact replace the Buick car. Gray still retained title to the Buick and full control over it. At any time he could have taken it from the custody of the Motor Company and put it into use; at any time the Motor Company was privileged to use the car on Gray's behalf in order to demonstrate it to a customer; *and in either case it would have been impossible for the company to show that the car was not still covered by the policy if an accident had occurred and liability on Gray's part had ensued.* These circumstances distinguish the case from Merchants Mutual Casualty Co. v. Lambert, 90 N.H. 507, 11 A. 2d 361, 127 A.L.R. 483, upon which the appellant mainly relies, for in that case, although the old car covered by the policy remained in the insured's garage, with license plates attached, after the purchase of the new car, it had not been used by the insured for several months prior thereto, because it was worn out, out of repair, and not fit to be driven on the public highway. It was upon these facts that the court held that a transfer of insurance took place under the replacement clause despite the retention of ownership and possession of the old automobile by the insured." (Emphasis added).

Another leading case which discusses the newly acquired automobile provision is *State Farm Mutual Insurance Co.* v. *Shaffer,* 108 S.E. 2d 49, 250 N.C. 49 (1959), which held that the vehicle alleged to be newly acquired must replace the car described in the policy and the allegedly replaced automobile covered by the policy must be disposed of or be incapable of further service at the time of the alleged replacement.

Mitcham and *Shaffer,* supra, were cited with approval in *Lynam* v. *Employers' Liability Assurance Corporation,* 218 F.Supp. 383 (1963), U.S.D.C. Dela., affd. 331 F. 2d 757, U.S.C.A. 3rd Circuit (1964), wherein the Court had under consideration a newly acquired automobile clause almost identical with that of the policy now under consideration. The District Court stated:

> "The Courts which have interpreted this clause in insurance policies are generally in accord with each other. The holdings are expressed very aptly in the following quotation:
>
> > " '* * * the replacement vehicle is one the ownership of which has been acquired after the issuance of the policy and during the policy period, and it must replace the car described in the policy, which must be disposed of or be incapable of further service at the time of the replacement.'
>
> "State Farm Mutual Automobile Ins. Co. v. Shaffer, 250 N.C. 45, 108 S.E. 2d 49, 54 (1959)."

The three cases mentioned above were cited in Respondent's original brief before the Court of Ap-

peals and in the Petitioners' brief, filed in the Court below, the following concession was made by them: "The general rule of law set forth in the several cases cited by State Farm as to the legal definition of a replacement automobile is identical with that used by the District Court and is, in effect, the law of all such cases, and facts of any particular case must be tested by that law."

Petitioners claim (Petition p. 20) that Kentucky has a "compulsory Financial Responsibility Law" and that there is "a body of law in several states holding that an insurer cannot interpose the defense of an alleged breach of the policy by the insured against innocent third parties" although Petitioners concede that Kentucky does allow such defenses. Actually we are not here concerned with a subsequent "breach" but whether or not there was insurance coverage in the first instance.

Kentucky does not have a "compulsory Financial Responsibility Law" but does have a Financial Responsibility Law (Kentucky Revised Statutes, Chapter 187) which was originally enacted in 1936.

The policy of Petitioner Yenowine, herein sued on, was not a policy which was issued to Petitioner Yenowine to comply with the Financial Responsibility Law because the Kentucky Court held in *Travelers Ins. Co.* v. *Boyd,* 312 Ky. 527, 228 S.W. 2d 421, that the Financial Responsibility Law of Kentucky *"acts in futuro"* and the law does not apply where the insured (in the case at bar Petitioner Yenowine) had not been re-

quired to furnish proof of her ability to respond in damages by taking out a liability policy covering an accident which might occur at a later date.

Kentucky Revised Statutes, Chapter 187, was amended in 1946 and the Court of Appeals of Kentucky in *Kentucky Farm Bureau Mut. Ins. Co.* v. *Miles,* Ky., 267 S.W. 2d 928 (1954) stated:

> "While the Financial Responsibility Law, which was amended in 1946, has not been construed by this Court, as it relates to the question involved, an act of 1936 in most respects identical to the one in controversy was interpreted in the Boyd case, cited above, and there we said (312 Ky. 527, 228 S.W. 2d 423): '* * * The whole spirit and tenor of the 1936 act is that it acts *in futuro.* It does not apply to the first accident nor is it applicable where the insured had not been required to furnish proof of his ability to respond in damages by taking out a liability policy covering an accident occurring thereafter. * * *'
>
> "(3) Had the accident occurred while the Act of 1936 was in force, it is clear appellant would be under no liability to either appellee or the insured. Appellee contends here, however, that the Act of 1946 applies not only to subsequent accidents but to any accident that may occur during the life of the policy. We disagree. A careful reading of the entire Act of 1946 discloses that it refers repeatedly to 'future accidents' and that, similarly to the act of 1936, it operates *in futuro.* Our interpretation of the Act of 1946 is the same as that arrived at in the United States District Court of Kentucky for the Western District in

State Auto Mutual Insurance Company v. Sinclair, 96 F.Supp. 267, and in Strode v. Commercial Casualty Insurance Company, 1952, 102 F.Supp. 240. We think each of these cases correctly decided the issue under discussion."

Petitioners find it necessary (Petition p. 20) to argue that based on "a moral consideration" they should have this case decided on exceptions to the general "rule of law under which this case was tried" and are entitled to claim an "added right", the "temporary retention" doctrine, such as was announced in *Brescoll v. Nationwide Mut. Ins. Co.,* 116 Ohio App. 537, 22 Ohio Ops. 2d 423, 189 N.E. 2d 173 (1961).

The instructions of the District Court on "replacement" (Record 66a) do not permit an automobile to qualify as a "replacement" if the old automobile is "temporarily retained" but it must be disposed of and in *Brescoll,* as opposed to the facts in the case at bar, the automobile covered by the policy was "out of service for repairs" and the Ohio Court noted that the described automobile, after its repair, was used only for transportation incidental to its sale, as distinguished from the same use to which the insured automobile had been put before the acquisition of the alleged replacement automobile.

Here, the Yenowine 1953 Plymouth automobile covered by the policy was not "out of service" at the time either the 1955 Plymouth or 1956 Plymouth was acquired and there is no contention by Petitioners that the 1953 Plymouth was, at the times mentioned, not

serviceable but it was, on the contrary, "in running order."

Maryland Casualty Company v. *Toney, et al.*, 178 Va. 196, 16 S.E. 2d 340 (1941), relied on by Petitioners actually supports Respondent's position and is in harmony with the decision of the Court of Appeals.

The facts in that case revealed that a 1937 Ford was covered by the policy and the insured decided to trade it for a 1937 Dodge. The trade was effected on January 31, 1939, and the next day the insured began negotiations for an exchange of the Dodge for a new 1939 Chevrolet. The Dodge was left in the possession of a dealer who, on February 13, 1939, advised the assured that the deal could not be effected, and the insured cancelled his order for the new Chevrolet. The Dodge was returned to the insured, and on February 17, 1939, the assured was involved in an accident while driving the Dodge automobile. The Court noted that there was some dispute in the testimony as to whether the insured had actually used the Dodge automobile while it was in the possession of the dealer although the insured apparently was privileged to do so.

The Virginia court held that the named insured had not notified the insurance company, within the ten day period prescribed by the policy. To offset this holding, the judgment creditor, Toney, contended that the ten day period did not begin to run until February 13, when the proposed exchange of the Dodge for the new Chevrolet had been called off, but the Court rejected this contention and *held that the*

Dodge was always owned by the named insured, and it was "capable of being used by him in the same manner as the Ford, which it replaced." This was another case contrary to the case now under consideration, *where the automobile described in the policy was disposed of.* (Emphasis added).

Another case of Petitioners, *Kaczmarck* v. *LaPerriere,* 337 Mich. 500, 60 N.W. 2d 327 (1953), does not support their position because in that case the named insured owned a Packard automobile which was insured, and on November 18, 1947, traded the Packard for an Oldsmobile, which he subsequently disposed of and acquired a Pontiac automobile on June 22, 1948. The Court held that the Pontiac qualified as a replacement, but noted specifically that the Oldsmobile was seldom operated and that the insured automobile had been disposed of. In the case at bar, Yenowine drove the 1955 Plymouth almost daily for four months, by her own admission, and the 1953 Plymouth, which was insured under the policy, had not been disposed of and was not disposed of until many months after the 1956 Plymouth was acquired and after the accident occurred.

Merchants Mutual Casualty Company v. *Lambert,* 90 N.H. 407, 11 A. 2d 361, 362, 363 (1940), cited on Page 19 of the Petition, does not apply because the New Hampshire court found as a matter of fact that the automobile described in the policy "was not used by the defendant Lambert in his business because the car was worn out, out of repair and not fit to be driven on the public highway."

Petitioners apparently realize that even their "added right" based on the "temporary retention" doctrine is without merit and, therefore, claim that Petitioner Edythe Yenowine discarded the 1953 Plymouth by inferring that she gave that automobile to her son who was about 17 years of age. We respectfully refer the Court to her testimony, concerning the alleged gift, which appears in the Record on Pages 44a and 46a. This testimony, viewed in its most charitable light, shows merely a possible intention of the Petitioner Yenowine to give the automobile to her son who testified (Record 59a-60a) that said Petitioner never did actually give the 1953 Plymouth to him and admitted that he "never did actually get the car."

Under Kentucky law, the intention of an alleged donor to make a gift without actually doing so is not sufficient to establish a gift, *Chipman's Adm'r.* v. *Gerlach,* 286 Ky. 157, 150 S.W. 2d 633 (1941), and in *Knox Adm'r.* v. *Trimble Adm'r.,* Ky., 324 S.W. 2d 130 (1959), the Kentucky Court of Appeals, with respect to the proof necessary to establish a gift, stated: (p. 132)

> "It is also noted that evidence of a gift inter vivos must be clear, convincing and free from reasonable doubt, Hale v. Hale, 189 Ky. 171, 224 S.W. 1078, and the burden of establishing the gift rests on the party claiming it, Combs v. Roark's Adm'r, 221 Ky. 679, 299 S.W. 576.
>
> "We have often said that to constitute a valid gift inter vivos, there must be a gratuitous and absolute transfer of the property from the donor

to the donee which takes effect immediately and is fully executed by delivery of the property by the donor and the acceptance thereof by the donee. Such gifts have no reference to the future, but must be immediate and absolute. *Furthermore, where the donor retains control and dominion of the property, the gift is of no effect because the delivery must be absolute.* Foxworthy v. Adams, 136 Ky. 403, 124 S.W. 381, 27 L.R.A., N.S., 308; and Goodan v. Goodan, 184 Ky. 79, 211 S.W. 423;" (Emphasis added).

Under the admitted facts, the 1953 automobile was at all pertinent times under the "control and dominion" of Petitioner Yenowine and even conceding, arguendo, that she did intend to give the automobile to her son, this was only a hope that at some future time the gift would be effected. A case in point is *Government Employees Co.* v. *Thomas,* Ky., 357 S.W. 2d 548 (1952), which involved the question of whether an automobile policy afforded coverage for a temporary substitute automobile which was specifically defined as one not owned by the insured.

There, the facts were that the named insured, Yoder, owned three vehicles, viz: a Sunbeam automobile, covered by the policy, a Harley-Davidson motorcycle, and a Chevrolet. Sometime before the accident the Sunbeam became disabled and was placed in a garage for repairs, but it was proven that about six weeks before the disablement Yoder had surrendered possession of the Chevrolet to Williams, who desired, in the future, to buy the automobile.

The Court noted that the testimony, at most, indicated that Yoder had surrendered the Chevrolet with the hope that Williams would buy it from him, and Williams testified that he and Yoder had verbally agreed that Williams was to buy the car and pay Yoder as soon as he could get the money, and that the Chevrolet would then become his. He also testified that after the verbal agreement was entered into, Yoder gave him possession of the Chevrolet. The Court sustained the insurance company's contention that the Chevrolet was not a non-owned automobile, but was owned by Yoder, and declared:

> "In addition, there had been no transfer of title under KRS 186.020 We recognize that compliance or non-compliance with the provisions of this statute is not conclusive of the ownership of a car. Higgenbotham v. Higginbotham's Trustee, 253 Ky. 218, 69 S.W. 2d 329; Moore v. Wilson, 230 Ky. 49, 18 S.W. 2d 873. However, the failure to comply, in itself, is of some evidentiary value which, when taken with the testimony, convinces us that the agreement expressed little more than the hope that some time in the future there might be a sale of the automobile."

In the case at bar the Bill of Sale to the 1953 Plymouth was, from the date of its acquisition in 1956, in the named insured, Yenowine, and remained so until she, admittedly, signed a Bill of Sale, in June 1962 and about a year after the accident, by which she transferred title.

2. THE DECISION OF THE COURT OF APPEALS IS NOT "CONTRARY TO HOW SUCH QUESTION HAS BEEN DECIDED BY ANOTHER FEDERAL COURT OF APPEALS" NOR IS IT CONTRARY TO KENTUCKY LAW.

Petitioners claim Certiorari should be granted because (1) the Decision of the Court of Appeals is contrary to the decision of the Fourth Circuit in *Mitcham* v. *Travelers Indemnity Co.*, 127 F. 2d 27, which was decided in 1942, and (2) the Sixth Circuit decision is contrary to the law of Kentucky as contained in *Brown* v. *State Farm Mutual Automobile Insurance Co.*, 306 S.W. 2d 836, Ky.. (1957).

Mitcham, supra, simply held that under the facts therein, there was no replacement of the automobile covered by the policy and the fact that notice of the alleged replacement was not given within the time prescribed by the policy was only "another insuperable objection" to recovery under the policy.

In other words, *Mitcham* recognized, as did the Court below, that there must be an actual replacement of which fact notice must be given, but *Mitcham* was not decided solely on the question of notice and that decision is entirely consonant with the decision of the Sixth Circuit. Under the Newly Acquired Automobile clause, supra, of the policy here involved, there must first be a replacement and if there is no replacement, notice, whether given or not, is of no effect and furthermore this case was presented to the Court below solely on the question of whether or not there was, in fact and law, a "replacement."

The Kentucky case, *Brown* v. *State Farm Mutual Automobile Insurance Co.,* which Petitioners now embrace, was not even relied upon by them either in the original brief or oral argument or in the Petition for Rehearing and Brown is not in conflict with the Decision of the Court of Appeals but actually supports it and is contra to Petitioners' claims.

There are no Kentucky cases factually in point but a Newly Acquired Automobile clause, almost identical with that now under consideration, was construed by the Kentucky Court of Appeals in *Brown,* wherein it was held that the Newly Acquired Automobile clause was not ambiguous and that it was necessary, under the clause, for the insured not only to notify the company but there must also be an actual replacement of the automobile described in the policy.

It was contended in *Brown* that the Newly Acquired Automobile clause should be most strongly construed against the assurer which is somewhat akin to Petitioners' present argument that they are entitled to some "added right" or should be able to rely upon some exceptions to the general rule of law regarding replacement vehicles.

The Kentucky Court of Appeals stated:

> "* * * By no stretch of the imagination did appellant comply with the terms of the policy when he attempted to substitute the Ford car he owned at the time the policy was issued for the Studebaker, covered by the policy. When the policy gave appellant the right to replace his Studebaker with a 'newly acquired automobile

> * * * * if the named insured notifies the company within thirty days following the date of its delivery to him,' certainly it was within the contemplation of the parties that the replacement must be a car the insured would acquire in the future and not one he owned at the time the policy was issued to him."

Petitioners are striving to have the 1956 Plymouth judicially determined to be a replacement of the 1953 Plymouth, covered by the policy, because Yenowine "attempted to substitute" or "attempted" to give the 1953 Plymouth automobile, covered by the policy, to her son which attempt did not constitute a disposal of the 1953 Plymouth under the law of Kentucky heretofore cited in this brief.

CONCLUSION

For the foregoing reasons, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 289

EDYTHE YENOWINE,
ELSIE DENSMORE,
DONALD D. DENSMORE and
DANIEL W. ROWE, Administrator of the Estate of LILA CRAWFORD, Deceased, - *Petitioners,*

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, - - - - *Respondent.*

REPLY BRIEF FOR PETITIONERS.

The Petitioners deem it desirable to offer this reply in order to clarify certain matters contained in Respondent's brief and in addition to point out omissions therein which are in themselves illuminating.

The Respondent has refused to accept our statement of the questions presented (Petition, pages 2-3), and has instead gone back to the period before the opinion of the Court of Appeals was entered by merely substituting a rehash of the question as presented to that Court. To accept such question now as the sole guide to this Court would, of course, ignore the issues raised by the Court of Appeals in its opinion and which

should be examined now in determining whether or not that Court erred. It is our belief that the Respondent has dodged the questions as presented in our Petition for the simple reason that it was unable to answer them and instead has contented itself by the use of innuendo in attempting to explain one or two of them.

For example, we refer the Court to page 4 of Respondent's brief where after first stating that it wished to correct "inaccuracies" in our statement of the case Respondent then immediately proceeds to make one itself by attempting to answer our question No. 4 (Petition, page 3), through its assertion that it "did not agree that said instruction should be given to the jury" but instead "made motions for a directed verdict at the conclusion of the plaintiff's and intervenors' proof and again at the conclusion of all of the proof." Of course, such action by the Respondent was merely directed toward the alleged insufficiency of the *proof* and had absolutely nothing at all to do with the point we raised in question No. 4—and which we reassert—which is that the Respondent entered no objection to the trial court's instructions to the jury on the definition of "replacement" nor did it offer any definition of the word "discard" contained in said instruction. So, the Respondent, by innuendo, is here attempting to equate a motion for a directed verdict with an objection to the Court's instruction which we submit is stretching things too far.

At page 7 of Respondent's brief its citation of and heavy reliance upon the case of *Mitcham* v. *Travelers Indemnity Co.*, 127 F. 2d 27 (C.C.A., 4) (1942)—and

which has been cited in the Petition as supporting our position on the issue of notice—is surprising since it does not in any manner support Respondent's position. The best way of pointing this out to the Court is to refer to the case of *Brescoll* v. *Nationwide Mut. Ins. Co.*, 116 Ohio App. 537, 22 Ohio Ops. 2d 423, 189 N. E. 2d 173, which at page 176 of its opinion had this to say about the *Mitcham* case:

> "However, that decision turned *primarily* upon the failure of the insured to give notice of the acquisition of the second automobile within ten days following the date of its delivery, as specifically required by the terms of the policy involved in that case. Furthermore, as pointed out by the Superior Court of Delaware in Nationwide Mutual Ins. Co. v. Mast, supra, in the Mitcham case the second car was bought as an *additional* vehicle, and *with a trade-in of a relative's car,* and could not be considered a replacement for the original insured car. See, also, Maryland Indemnity & Fire Ins. Exchange v. Steers (1960), 221 Md. 380, 157 A. 2d 803, distinguishing the Mitcham case" (Emphasis added).

In the case at bar Mrs. Yenowine could not possibly have claimed coverage on the 1953 Plymouth following her notice to the insurance company to transfer coverage to the 1956 Plymouth (and which notice Respondent does not challenge) because the insurance company would simply have relied on that notice as a bar.

At page 10 of its brief Respondent is correct in stating that Kentucky does not have a "compulsory"

Financial Responsibility Law. However, this is actually immaterial in so far as the point we were making in the Petition and which we reassert here which is that Kentucky does have a Financial Responsibility Law and that there is authority in a number of states even as regards insurance voluntarily carried, that the injured person is not subject to defenses arising out of breach of conditions subsequent which would have been available to the insurer as against the insured, 76 ALR 222 *et seq.*, 123 ALR 989, 18 ALR 2d 499 *et seq.*, 85 ALR 75 *et seq.*, 106 ALR 535. As stated in the Petition Kentucky allows such defenses and so our point is merely this: That from a moral consideration since the Respondent has been permitted to use these defenses against the intervening Petitioners that said Petitioners have an added right to rely on the cases allowing coverage where there is "temporary retention" of the old car by the insured.

In addition, since the Court of Appeals in its opinion substituted a different rule for "replacement" for the one given to the jury by the trial court and since the Respondent is now contending (as it did in the Court of Appeals) for a meaning of "discard" in the rule equivalent to "a legal transfer to another person" which is completely contrary to the normal meaning of that word as it was understood and applied by the jury, the Petitioners see no reason why they should be the only ones without a chance to "get in on the act" by a variation of the rule to suit themselves by reliance on these cases allowing coverage where there is "temporary retention" of the old car by the insured.

However, contrary to what Respondent alleges in its brief this "temporary retention" is not by any means Petitioners' sole argument—as even a cursory reading of the Petition will show—but is merely supplementary to our main argument. Petitioners are perfectly happy to have this case decided solely on the basis of the rule as given to the jury by the trial court, but think that everyone should be bound by the trial court's rule, not just the Petitioners.

At page 18 of Respondent's brief there are some statements made regarding the *Mitcham* case which are in gross error: Respondent first attempts to give the impression that in *Mitcham* the issue of notice was not regarded as being a decisive factor. Such allegation is erroneous as shown in the first instance by the *Brescoll* case, *supra,* which stated that in the *Mitcham* case the issue of notice was *"primarily"* the factor in deciding the case. This is also easily shown by the language of *Mitcham* itself which at page 29 of the opinion stated:

> "* * * The failure to give the notice was fatal to the claim of the administratrix and the injured person that the car was covered by the policy when the accident took place."

Respondent (page 18 of its brief) makes the erroneous statement that the Court of Appeals in deciding the case at bar did so in harmony with the *Mitcham* case on the issue of notice:

> "In other words, *Mitcham* recognized, *as did the Court below,* that there must be an actual re-

> placement *of which fact notice must be given,* but *Mitcham* was not decided solely on the question of notice and that decision is entirely consonant with the decision of the Sixth Circuit" (Emphasis added).

This statement of Respondent's gives the impression that the Court of Appeals gave proper recognition to the issue of notice in the case at bar whereas in point of fact it did nothing of the kind (as was repeatedly made clear in our Petition) but on the contrary the Court of Appeals said only that the issue of notice was not applicable (Petition, page 28 of Appendix) and did not thereafter give even a single reason for its failure to discuss the issue as is shown by the opinion of said Court.

Also in this same paragraph of Respondent's brief from which the above quotation was made there is another erroneous statement which we refer to:

> "* * * Under the Newly Acquired Automobile clause, supra, of the policy here involved, there must first be a replacement and if there is no replacement, notice, whether given or not, is of no effect and *furthermore this case was presented to the Court below solely on the question of whether or not there was, in fact and law, a 'replacement'* " (Emphasis added).

This statement that the issue of notice was not presented to the Court of Appeals is completely mystifying to us because it is 100% erroneous as can easily be demonstrated. In our brief to the Court of Appeals at pages 14-15 we said this to that Court on the matter of notice:

"In the instant case the Court submitted interrogatories and instructions to the jury which gave the jury the law of the case, expressed in language identical to that in the cases cited by State Farm in its brief and the jury apparently applied the law given by the Court to the facts which they deduced from the evidence and concluded as follows:

"(1) Mrs. Yenowine notified State Farm of the purchase of the 1956 Plymouth automobile and that she wanted the insurance changed from the 1953 to the 1956.

"(2) The 1956 Plymouth, in fact, replaced the 1953 Plymouth within the meaning of the law given the jury by the Court.

"The foregoing findings of the jury were to the exclusion of State Farm's theories that the 1956 replaced the 1955 or that the 1955 replaced the 1953, and if we accept as fact the finding of the jury that Yenowine notified State Farm's agent of the desired change of insurance from the 1953 to the 1956 (*and State Farm does not contest this in its brief*) then all possible dangers of dual insurance coverage were thereby removed, and any claim by Yenowine at a later date that the 1953 was insured under the policy would have been properly rejected on the basis of her notice. * * *"

In addition, during the oral argument of this case before the Court of Appeals counsel for Petitioners pointed out to that Court the feature of the policy requiring notice under the Newly Acquired Automobile clause and to which counsel for Respondent made no reply.

And the matter of notice was also brought to the attention of the Court of Appeals in our Petition for Rehearing.

The only explanation we can find for the Respondent's erroneous statements referred to hereinabove is that the writer of the Respondent's brief is making his very first appearance in this case—he did not even sit in on the trial as an observer—and is consequently unfamiliar with the proceedings; however, we do not understand why he did not check these matters with the trial counsel before putting them before this Court.

To summarize the Respondent's brief we show as follows:

1. The Respondent has been unable to cite a single case or any other authority for the proposition that an insured must first transfer the old automobile in a completely legal manner to someone else under the rules regarding "replacement" which say that the old car must be "discarded" or "disposed of," even though such interpretation is the only possible basis for upsetting the jury verdict that Mrs. Yenowine discarded the 1953 Plymouth. *Nor has the Respondent been able to give any valid reason why it should even be allowed to claim such a meaning to the word "discard" (or "disposed of") in the first instance since Respondent offered no objection to the trial court's instruction nor did it tender any instruction of its own but on the contrary let the jury decide the issue according to the normal meaning of the word* and is therefore estopped by Rule 51 of the Federal Rules of Civil Procedure.

2. Respondent has been unable to cite any authority for the proposition that the intervening 1955 Plymouth replaced the 1953 Plymouth and that the 1956 Plymouth replaced the 1955 Plymouth (as found by the Court of Appeals). This is not surprising since to do so Respondent would have been required to produce a case stating that a replacement (the intervening 1955 Plymouth) could be made not only contrary to the insured's intentions but also contrary to the policy which requires notice since it is undisputed that Mrs. Yenowine did not want the 1955 Plymouth as a policy replacement and never notified Respondent of said 1955 Plymouth (Record 28a).

In short, Respondent has utterly failed to make out a case to sustain its position and that of the Court below. All the cases the Respondent has relied upon on the issue of replacement (with the exception of the *Mitcham* case which has already been distinguished, *supra*), involve instances where a person owned more than one vehicle at the time of the issuance of his policy, only one of which was named in the policy, and afterward attempted to have the unnamed vehicle which had been involved in an accident considered as a replacement for the named one which had previously been rendered undriveable for some reason. The Courts have uniformly held in such fact situations that there is no replacement under the "Newly Acquired Automobile" clause for the reason that such a vehicle simply is not newly acquired but was owned either before or simultaneously with the issuance of the policy

to the insured. However, that is a completely different fact situation from the Yenowine case for the following reasons:

1. Mrs. Yenowine acquired her policy from Respondent on April 7, 1956 insuring the 1953 Plymouth (Record 26a).

2. Thereafter, she acquired the 1956 Plymouth on November 30, 1960 (Record 4b-5b).

So, beyond any doubt the 1956 Plymouth was newly acquired and fully qualified in fact and under the law as a replacement for the 1953 Plymouth named in the policy as the jury so found and as the trial court so held.

CONCLUSION.

For the foregoing reasons, and for the reasons stated previously, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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